Supreme Court, U.S.
FILED
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

FILING A PETITION FOR WRIT OF CERTIORARI

ANTHONY M. KIPEN
Petitioner,

v.

DEPARTMENT OF THE NAVY
Respondent,

Petition for review of an order of the Merit Systems Protection Board issued in AT0752940093-I-1 on December 1, 1994, denying review of the initial decision dated July 29, 1994.

KIPEN V NAVY, 95-3182

ANTHONY M. KIPEN
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Pro Se

30 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a person working for the U.S. Navy civil service can be denied the right to a fair trial after being totally psychologically harassed during his or her employment or protected during that employment as guaranteed in the fifth and fourteenth amendments?

2. Whether a court may omit the requested evidence to be submitted or enforcement of a subpoena for the submission of that evidence and to rely totally upon the credibility of individuals who admittedly destroyed the evidence to cover up the truth and who submitted tainted and false testimony and false documents? Does the fifth and fourteenth amendment cover the employee or the employer?

3. Whether a court may deny a petitioner the right to a fair hearing and full discovery of all of the evidence, documentation, psychological, whistle blowing evidence, trends, or accept only oral testimony and deny discovery, by allowing due process as guaranteed in the Fifth and Fourteenth Amendments?

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The following named individual is a party to the proceedings in the court below:

Anthony M. Kipen.

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OPINIONS

The May 12, 1995 opinion of the U.S. Court of Appeals for Federal Circuit, whose judgement is sought to be reviewed is reported at 95-3182 and is reprinted in the separate Appendix to this Petition, Page 23-30. Pursuant to Fed. Cir. R. 47.6 this disposition is not citable as precedent. It is public record. This disposition will appear in tables published periodically. The prior opinion of the Merit System Protection Board

decision is published, case No. AT-0752-94-0093-I-1 and is reprinted in a separate appendix to this petition, pg. 30-32.

STATEMENT OF JURISDICTION

The judgement of the court of appeals was entered on May 12, 1995. The Jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1)

CONSTITUTIONAL PROVISIONS, STATUTES, RULES REGULATIONS INVOLVED

The case directly involves the Fifth Amendment to which the constitution states, as follows:

> That no person shall be deprived of life, liberty or property without the due process of law.

The case also involves the Fourteenth Amendment to which the constitution states

that an individual is entitled to a fair trial as required by the due process clause.

STATEMENT OF THE CASE

Under title 28 U.S.C. rule 37 (4) (2) that a right to full disclosure of all the evidence be made available upon subpoena of the evidence and that is the case in which the subpoena and the request were made for the submission on the evidence as well as certain witnesses. Under Rule 26 again states that if the records are requested at the hearing they shall be provided, and under Rule 33 (d) that full disclosure shall be made available to the petitioner. That evidence presented at the trial was not disclosed prior to the trial.

THE EVIDENCE;

The evidence in this case is in

question due to the denial for discovery and the failure of the government to present the evidence requested by the petitioner, the destruction of the evidence by the government, the witness change from defense to prosecution and the acceptance of documents that were numbered and dated one year late and evidence not disclosed about petitioners witnesses but presented at the hearing/trial and the whistle blowing allegations and evidence were not allowed as a contributing factor in the firing.

RULINGS BELOW

BROWN V. WAINWRIGHT, Judge Charles R. Scott of the United States District Court, M.D. Florida, Jacksonville Division held that in which both prosecution and defense were remiss in complying with

pretrial discovery rules. The trial court imposed exclusionary sanctions on defendant's evidence while admitting prosecution's evidence, evidence which was not disclosed prior to the trial.

U.S. V. STIFFEL, Judge J. Krenzler, United States District Court, N.D. Ohio, held that the prosecutions failure to produce evidence in its possession deprived defendant of a fair trial in violation of the fifth amendment.

MARANO V. DEPARTMENT OF JUSTICE, Judge Clevenger of the United States Court of Appeals, Federal Circuit allowed that the whistle blowing activity was a contributing factor to his reassignment.

PERKINS V. LeFERVE, Judge Kearse, Circuit Judge, United States Court of Appeals, Second District, held that there was no reasonable likelihood that fairness

of petitioner's trial was unaffected because of false testimony of prosecution witness.

U.S. V. BAGLEY, Supreme Court, Justice Blackmun, United States Supreme Court, held that evidence withheld by the government is "material" as would require reversal of conviction, only if there is reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different.

REASONS FOR GRANTING THE WRIT

The court should grant the writ for these reasons: First, the petitioner supplied a subpoena for material/written evidence and a list of witnesses and again requested the material evidence at the hearing. The material was presented in a very small part in that the evidence

relating directly to the incident was destroyed, and the job site superintendent who was on the job was not at the trial, but a fill in superintendent testified falsely that he was at the site. A contractor testified that petitioner was not on his job site, but could not provide the written daily reports requested by the petitioner to prove that his testimony was true. The daily reports, "material evidence", that was subpoenaed is required by the government from every job before payment for the completed job is authorized. This material evidence is signed by the inspector, the supervisor, the engineer in charge of the job and the contractor, or his representative. Second the defense offered alleged evidence about the alleged firing of petitioner's witness at the trial with no prior knowledge of

such a firing or even the hint that the witness was any other then retired. Evidence was offered by the government in an attempt to perjure the second witness without prior knowledge given to the petitioner and an attempt was made to discredit this witness, further the government converted a witness for the petitioner to the prosecution to keep the witness from telling the truth about the incident. Third, disallowed any whistle blower evidence or results to be brought in to the court in defense of petitioner.

I

The District Court Was Wrong In Its Conclusion Because It Was Not Allowed To See Or To Hear All Of The Evidence Available To It As To Allow For Fair Trial.

The majority opinion of the courts allow that all the evidence shall be submitted so as to permit a fair and impartial hearing, as guaranteed in the Fifth and Fourteenth Amendments. Written documented evidence was withheld or destroyed by the government and testimony to the destroying of evidence was given. Witnesses with records withheld those records, so the facts could be hidden or misquoted

II

The Court Was Wrong In Its Decision Because It Was Denied Opportunity To See Or Hear The Whistle Blowing Evidence In The Case.

Whistle Blowers are allowed a certain amount of protection under the Whistle Blower Act, 5 U.S.C 5 2302 (b)(8), the court did not allow petitioner to cite, as

to what disclosed, to whom disclosed or when disclosed and did not allow any prior knowledge of whistle blowing. Petitioner was dismissed in 1990 for whistle blowing. The Contractor on the job related to petitioners dismissal was turned in for fraud and waste, and the supervisor allowing the contractor to proceed with out correcting the work was also turned in for not assisting the petitioner in correcting the problem and for aiding the contractor in defrauding the government.

III

The Court Did Not Accept Evidence Of Petitioners Job Related Responsibilities Or The Limits Of Those Responsibilities Or The Responsibilities Of Petitioners Supervisor Or Those Of The Contractor.

Evidence of petitioner's responsibilities on the job site and the

responsibility of the supervisors and the contractor's responsibilities were not taken into evidence as was the contractors complete disregard of doing the job right the first two times , as asked. Evidence of the total job site responsibility was given to the petitioner and responsibility was ignored by supervision although the evidence shows that supervision directly ordered the contractor to perform, not the petitioner, was not addressed in the judgement order, dated May 12, 1995. Petitioner was a job site inspector only, not an Engineer. The original work was turned in as faulty, and the corrections were Engineer directed and ordered. Petitioner inspected the work and it was again faulty for the third time. The destroyed daily reports reflect the contractors disregard for doing the work

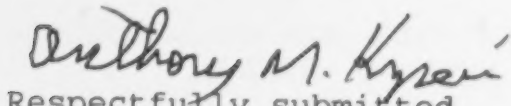
improperly and according to the supervisors directions and signed by the supervisor and the Engineer in Charge.

CONCLUSION

The right to a fair trial, due process and full disclosure have been stated to the best ability of a Pro Se Petitioner and this request for certiorari is in the interest of fairness and equality even though it was impossible to obtain an attorney for this case even at the hearing level as well as the District Court level. The unavailability of attorneys also denied the Petitioner a right to a fair trial whether the attorney said the case was economically unfeasible or not a winning case or the attorney stated he did not have the time to do the work required to win. Based on this

dissent and the factors mentioned above the petitioner respectfully pray that his petition for a writ of certiorari be granted.

Dated: August 9, 1995



Respectfully submitted,

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APPENDIX

A

DECISION OF THE MERIT SYSTEMS PROTECTION BOARD

B

JUDGEMENT OF UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

C

OPINION OF UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Signed Date August 9,1995

APPENDIX A

DECISION OF THE MERIT SYSTEMS PROTECTION BOARD

UNITED STATES OF AMERICA MERIT SYSTEMS
PROTECTION BOARD

ANTHONY M. KIPEN	)	Docket
	)	Number
Appellant,	)	At-0752-94-
	)	0093-I-1
v	)	
	)	
DEPARTMENT OF THE NAVY	)	
Agency	)	
	)	

Anthony M. Kipen,
Orange Park, Florida,
pro se.

J. William Green, Esquire,
North Charleston, South Carolina,
for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Atonio C. Amador, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on July 29, 1994,

because it does not meet the criteria for review set forth at 5 C.F.R. 1201.115. This is the boards final order in this appeal. The initial decision is now final. 5 C.F.R. 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. 7703(a)(1).

APPENDIX B

JUDGEMENT OF UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Note: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

95-3182

ANTHONY M. KIPEN

Petitioner,

V

DEPARTMENT OF THE NAVY

Respondent.

JUDGEMENT

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S). AT0752940093-I-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

DATED MAY 12, 1995
ENTERED BY ORDER OF THE COURT

Francis Z. Gindhart, Clerk

ISSUED AND MANDATE: July 5, 1995

APPENDIX C

OPINION OF UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTE: Pursuant to Fed. Cir R. 47.6, this disposition is not citable as precedent. It is public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

95-3182

ANTHONY M. KIPEN

Petitioner,

V.

DEPARTMENT OF THE NAVY

Respondent.

DECIDED: May 12, 1995

Before LOURIE, SCHALL and BRYSON, Circuit Judges.

PER CURIAM.

DECISION

Anthony M. Kipen seeks review of the final decision of the Merit Systems Protection Board ("Board") in Docket No. AT-0752-94-0093-I-1, sustaining his removal by the Department of the Navy

("Agency"). The July 29, 1994 initial decision of the administrative judge became final on December 1, 1994, when the full board denied Mr. Kipen's petition for review. We affirm.

DISCUSSION

On October 29, 1993, the agency removed Mr. Kipen from his position at the Naval Facilities Engineering Command in Jacksonville, Florida, for failure to carry out a proper order.

Mr. Kipen was the agency's construction representative on a certain construction project. In that capacity he was responsible for overseeing the repair of a stretch of sinking asphalt adjacent to a concrete pad used for storing forklifts. Mr. Kipen's supervisors determined that the repair was to be conducted by cutting out a two foot strip

of asphalt starting from the edge of the concreted, recompacting the base underneath, and then reasphalting the strip. Without authorization, Mr. Kipen approved a change in the repair. Instead of having the repair work performed as he had been directed, Mr. Kipen allowed a three- or four-inch strip to be cut out of the asphalt and a new layer of asphalt laid over the area from the strip up to the concrete, without the base being recompacted. Mr. Kipen was removed from his position for this action.

Mr. Kipen appealed the Navy's removal to the Board, which affirmed the Navy's decision. The Board found, based on the evidence presented at a hearing, that Mr. Kipen was given a proper order to have the repair work done in a specified manner and that he failed to carry out this order.

The Board concluded that Mr. Kipen's willful and intentional failure to obey an order provided a proper basis for removal.

Mr. Kipen challenges the Boards's factual findings and contends that he was removed from his position in retaliation for whistle blowing. This court affirms the Board's decision unless it is (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law; (2) obtained with out procedures required by law, rule or regulation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. 7703(c) (1988).

We have carefully considered Mr. Kipen's arguments and find them unpersuasive. Substantial evidence supports the Board's finding that Mr.

Kipen's failure to obey an order was willful and intentional. The finding of the Board rests on credibility determinations, which are "virtually unreviewable". Hambsch v. Department of the Treasury, 796 F. 2d. 430, 436 (Fed. Cir.. 1986).

The conclusion of the Board that Mr. Kipen failed to adequately support his affirmative defense of whistleblowing is likewise supported by substantial evidence. Mr. Kipen has failed to demonstrate that the Navy's actions were in any way retaliatory or disproportionate to his defense.

CERTIFICATE OF SERVICE

I certify that by this ORDER was sent today:

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August 9, 1995

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